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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT TACOMA

8 SHELIA D SPENSER and WILLIAM E
9 SPENSER,

10 Plaintiffs,

11 v.

12 DEUTSCHE BANK, NATIONAL
13 TRUST COMPANY, as Trustee for
14 FFMLT, Trust 2005FF2, et al.,

15 Defendants.

16 CASE NO. C11-5599BHS

17 ORDER GRANTING
18 DEFENDANT'S MOTION TO
19 DISMISS

20 This matter comes before the Court on Defendant Northwest Trustee Services,
21 Inc.'s ("Northwest") motion to dismiss (Dkt. 6). The Court has reviewed the briefs filed
22 in support of the motion and the remainder of the file and hereby grants the motion for the
23 reasons stated herein.

24 **I. PROCEDURAL HISTORY**

25 On August 4, 2011, Plaintiffs Shelia and William Spenser ("the Spensers") filed a
26 complaint against Defendants Deutsche Bank, National Trust Company as Trustee for
27 FFMLT, Trust 2005FF2; Bank of America, NA; Wells Fargo, NA; Northwest; and
28 Fairbanks Capital Select Portfolio. Dkt. 1. The Spensers' request for relief is as follows:

29 We want to stay the foreclosure until we can find out who is the real
30 holder of the original note and deed of trust. The lender holding the original
31 note and deed of trust produce the originals with wet ink signatures for our
32 inspection.

33 *Id.* at 4.

1 On August 18, 2011, Northwest filed a motion to dismiss. Dkt. 6. The Spensers
2 did not respond.

3 **II. FACTUAL BACKGROUND**

4 On or about November 11, 2004, in consideration for a mortgage loan, William
5 Spenser executed a promissory note (the “Note”) in the amount of \$152,000.00, payable
6 to First Franklin Financial Corporation (“First Franklin”), and a Deed of Trust in favor of
7 First Franklin. *See* Dkt. 6 at 10-29 (“Deed of Trust”). The Deed of Trust names First
8 American as the Trustee, and grants the Trustee the power of sale in the event of default.
9 *Id.* The Deed of Trust was recorded on November 17, 2004 under Pierce County
10 Auditor’s No. 200411170934, and encumbers a piece of real property located in Pierce
11 County, commonly known as 1503 South 11th Street, Tacoma, Washington 98405 (the
12 “Property”). *Id.*

13 On or about September 2, 2008, First Franklin executed an Assignment of the
14 Deed of Trust (“Assignment”) whereby all beneficial interest in the Deed of Trust was
15 transferred to Defendant Deutsche Bank National Trust Company, as Trustee for FFMLT
16 Trust 2005FF2, Mortgage Pass-Through Certificates, Series 2005-FF2 (“Deutsche
17 Bank”). *See* Dkt. 6 at 30-31. The Assignment was recorded under King County
18 Auditor’s No. 201010060273. *Id.*

19 On or about October 9, 2008, as a result of the Spensers’ default on payments due
20 under the Note secured by the Deed of Trust, the Spensers were sent a Notice of Default.
21 *See* Dkt. 6 at 32-34.

22 On October 24, 2008, Deutsche Bank recorded an Appointment of Successor
23 Trustee naming Northwest as Successor Trustee and vesting Northwest with the powers
24 of the original trustee. *See* Dkt. 6 at 35; *see also* RCW 61.24.010(2). The Appointment
25 of Successor Trustee was recorded under Pierce County Auditor’s No. 200810240549.
26
27 *Id.*

1 On or about March 15. 2011, Deutsche Bank, through its agent BAC Home Loans
2 Servicing, LP, executed a beneficiary declaration stating that

3 Deutsche Bank National Trust Company. as Trustee for the Holders of The
4 First Franklin Mortgage Loan Trust 2005FF2, Mortgage Pass-Through
Certificates, Series 2005-FF2 is the beneficiary (as defined by RCW
5 61.24.005(2)) and actual holder of the promissory note or other obligation
6 secured by the deed of trust or has the requisite authority under the RCW
62A.3-301 to enforce said obligation for the above mentioned loan account.

7 See Dkt. 6 at 36.

8 On April 29, 2011, Northwest recorded a Notice of Trustee's Sale concerning the
9 Property under Pierce County Auditor's No. 201104290278. *Id.* at 37-40. The Notice of
10 Trustee's Sale references the parties to, and recording information of, the Deed of Trust,
11 and set a sale date of August 5, 2011. *Id.*

12 On August 5, 2011, the Trustee's Sale was postponed to September 30, 2011. *Id.*
13 at 41-42.

14 III. DISCUSSION

15 As a threshold matter, failure to respond to a motion may be considered by the
16 Court as an admission that the motion has merit. Local Rule CR 7(b)(2). The Spensers
17 did not respond to Northwest's motion and the Court considers this failure as an
18 admission that Northwest's motion has merit.

19 With regard to the motion, a Rule 12(b)(6) motion may be based on either the lack
20 of a cognizable legal theory or the absence of sufficient facts alleged under such a theory.
21 *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). Material
22 allegations are taken as admitted and the complaint is construed in the plaintiff's favor.
23 *Keniston v. Roberts*, 717 F.2d 1295, 1301 (9th Cir. 1983). To survive a motion to dismiss,
24 the complaint does not require detailed factual allegations but must provide the grounds
25 for entitlement to relief and not merely a "formulaic recitation" of the elements of a cause
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1 of action. *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007). Plaintiffs must
2 allege “enough facts to state a claim to relief that is plausible on its face.” *Id.* at 1974.

3 In this case, the Court has read the Spensers complaint liberally and concludes that
4 they are asserting causes of action for a wrongful foreclosure and for failure to produce
5 the original note. First, there is no cause of action for “wrongful foreclosure” when no
6 foreclosure has in fact occurred. *See, e.g., Vawter v. Quality Loan Svc. Corp. of Wa.*, 707
7 F. Supp. 2d 1115, 1123-24 (W.D. Wash. 2010); *Engel v. First Am. Tit. Ins. Co.*, 2010 WL
8 3819372 (W.D. Wash.). A foreclosure of the Property has not occurred yet. Therefore,
9 the Court grants Northwest’s motion and the Spensers’ claim for wrongful foreclosure is
10 dismissed.

11 Second, courts “have routinely held that [a defendant’s] so-called ‘show me the
12 note’ argument lacks merit.” *Freeston v. Bishop, White & Marshall, P.S.*, 2010 WL
13 1186276 (W.D. Wash. 2010) (*quoting Diessner v. Mortgage Electronic Registration
14 Systems*, 618 F. Supp. 2d 1184, 1187 (D. Ariz. 2009) (collecting cases)).¹ The Spensers’
15 request that the foreclosure proceeding be halted until they are presented with the original
16 note is a meritless “show me the note” argument. Therefore, the Court grants
17 Northwest’s motion to dismiss the Spensers’ original note cause of action.
18

19 Finally, claims that are not based on a proper legal theory should be dismissed
20 without leave to amend. *Keniston*, 717 F.2d at 1300. Neither of the Spensers’ claims
21 against Northwest are based on a proper legal theory. Therefore, the Court will not afford
22 the Spensers an opportunity to amend their complaint.

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27 ¹ The Court’s ruling in *Freeston*, 2010 WL 1186276, was affirmed in a Ninth Circuit
28 memorandum opinion (Case No. 09-5560BHS, Dkts. 91, 93).

IV. ORDER

Therefore, it is hereby **ORDERED** that Northwest's motion to dismiss (Dkt. 6) is **GRANTED**.

DATED this 30th day of September, 2011.



BENJAMIN H. SETTLE
United States District Judge